

412-644-5754

CASE NO.: 1998-LHC-381

In the matter of

PHILLIP J. BOGDEN,
Claimant

v.

CONSOLIDATION COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest

APPEARANCES:

Joseph P. Moschetta, Esquire
For the Claimant

Michael W. Zimecki, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et. seq., herein referred to as the "LHWCA." A hearing was held before the undersigned on May 19, 1998, in Pittsburgh, Pennsylvania, at which all parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Claimant's Exhibits (CX) 1-25 and 27 and Employer's Exhibits (EX) A-H were admitted to the record without objection. The record remained open post-hearing for the submission of additional medical evidence (CX 28-32, EX I) and closing briefs.

I. STIPULATIONS

The parties stipulate and I therefore find:

- A. The claimant is covered by the Act.
- B. The claimant sustained an injury on March 20, 1996.
- C. The injury occurred in the course of the claimant's employment.
- D. The claimant provided timely notice of his injury to the employer.
- E. The employer filed timely notice of controversion.
- F. The claimant received temporary total disability benefits at a rate of \$781.71 per week from March 22, 1996, through January 24, 1998.
- G. Consolidation suspended temporary total disability payments pursuant to a Notice of Final Payment or Suspension of Compensation Payments issued on February 5, 1998, based on an Affidavit of Recovery signed by Tony Ricci, M.D., during an Independent Medical Examination on January 26, 1998.
- H. The claimant's average weekly wage ("AWW") is \$1,172.56.

II. ISSUES

The issues to be resolved are:

- A. Whether the claimant continues to suffer from, and require further medical care and treatment for, a work-related injury, impairment or disability suffered on March 20, 1996?
- B. Whether the claimant is permanently and totally disabled because of work-related injuries which occurred on March 20, 1996?
- C. Whether the onset date of the claimant's permanent and total disability is March 20, 1996?
- D. Whether the claimant's disability benefits, which were terminated by the employer as of February 5, 1998, should be reinstated effectively from February 5, 1998, to the time that the claimant is adjudicated as permanently and totally disabled and continuing through the duration of that disability?
- E. Whether the employer should pay the claimant's medical expenses pursuant to Section 7 of the Act, less amounts paid by the employer, and whether they should provide such additional services as the claimant's condition may require?

- F. Whether the TENS unit therapy prescribed by the claimant's physician was at all times reasonable, necessary or appropriate for, or causally related to, treatment of any work-related injury, impairment or disability?

III. FINDINGS OF FACT

A. BACKGROUND

Phillip J. Bogden, and his wife Elaine, testified at the hearing. Mr. Bogden has a high school education, in addition to completing heavy equipment operator school in the Navy. (TR 19). He also underwent six weeks of electrical school as a mechanic trainee at Dilworth mine. (TR 19). He testified that he has never had an occupation where he could work with his head rather than his arms, shoulders, neck, legs and back. (TR 104).

He worked on a farm from the age of nine until he graduated high school. He worked odd jobs in Pittsburgh until he was drafted in 1964. (TR 20). Mr. Bogden was stationed in Vietnam for one year, where he operated heavy equipment. (TR 21). He was honorably discharged from the Armed Services with no service-connected injuries or disabilities. (TR 22). Afterwards, he worked for the New York Telephone Company and as a sanitation man for New York City. When he and his wife left New York, he operated heavy equipment on the interstate and drove "bulk tank" tractor-trailers over the road. (TR 24-25). Mr. Bogden, a third generation coal miner, went to work in the mines on September 26, 1973. (TR 25). He worked underground for U. S. Steel at Blaker Shaft and Jarge Ford Shaft, and in 1976 transferred to Dilworth, where he stayed until the accident at issue. (TR 26). Consolidation Coal Company bought Dilworth in 1984 or 1985. (TR 26).

In February 1993, he began a permanent job as a "dock man" or "riverman." (TR 28). As a dock man, Mr. Bogden was involved with loading barges. Ninety percent of his job was on the barge, where he would set up the loads and empty strings for preparation to load the barges, and help set up tows for loaded barges to be shipped to other Consolidation mines. (TR 30-31).¹

Mr. Bogden used a hand-made model of the harbor to describe his work place, a labeled photograph of which was admitted into the record. (CX 27). The following items were identified for reference within the model (TR 54-57):²

- #1: Upstream "cell"
- #9: Downstream "cell"
- #2-8: Cells - Cylinder of pilings used to keep barges in a row.
- #10: Empty barge upstream, adjacent to cells #1-2.
- #11: Empty barge adjacent to cells #3,4,5

¹ The "Safe Work Instruction" from Consolidation Coal Company is in the record at CX 2, and lists the job duties of a riverman as positioning barges for loading, re-positioning loads, moving loaded barges, and re-positioning empties. The manual includes safe work instructions, key points, and safety precautions for each duty.

² Photographs and a video of the Dilworth harbor, including the items referenced in the model, are in the record at CX 3 and 4.

- #12: Loaded barge adjacent to cells #6,7,8, below the downstream loading chute
- #13: Loaded barge already moved out from under the loading chutes
- #14: Loaded “stopping” barge.
- #15: “Spar Barge”- permanent part of harbor which holds loaded barges between it and the cells so they do not swing out too far.
- #16: Tow boat
- #17: River building with upstream and downstream loading chutes.

Empty barges were brought in by tow boats and maneuvered under the tipple, where they were loaded with coal. (TR 32). The loaded barges were then maneuvered further downstream to the “loader fleet.” Until one year before his accident, the entire fleet of barges was pulled by hand. (TR 34). The barges are now moved by electric “winches,” lines that run independently upstream, downstream, or in tandem. (TR 38-39). A winch consists of 7/8 inch steel cables, weighing one and one-quarter pound per foot, which move the fleets with a forty horse power motor in each. (TR 40-41, 51). The upriver cable is 750 feet long, while the downstream cable is 733 feet. (TR 41). Mr. Bogden explained that a barge must move when being loaded, so it will load evenly and not capsize. (TR 43).

While the barges are in the loading process, the “running lines” connecting the barge to the winch are suppose to be on the inboard side of the two-foot tall “timberheads” on the walkway along the barges. (TR 59-60). If the line is on the outside, it can fall and get squeezed between the barge and the cells, causing it to fray or break. If a line breaks, the operation is stopped until the entire running line is replaced. (TR 60).

On March 26, 1996, the claimant was on the “spar barge” (#15), putting down sand on the ice and snow, when he noticed the running line on the (#11) barge was on the outboard side of the double timberhead. (TR 61). He radioed the barge loader to put slack in the upstream winch line. He reached down to pick up the steel line and, while facing downstream and struggling to get the line over the double timberhead, the running line came off the (#10) barge, continued rolling to the (#11) barge, and yanked the claimant down by twisting his right side. He testified, “[I]t just caught me and just whipped me down just like it pulled my whole upper body down.” (TR 66). He caught his hand between the steel cable and the barge when he fell. (TR 69). He thought his hand was broken, and put it in a puddle of slush to help the pain. (TR 67, 71). He felt pain in his shoulder and back, but tried to “work it off during the day” and continued working. (TR 67).

As he continued working the day of the accident, Mr. Bogden experienced burning in the front of his right leg, from his back to just above the knee, which went away when he sat down. (TR 78, 107). He never experienced this type of difficulty before. (TR 79). He could not use his right arm when showering at the end of the shift. (TR 80-81). The same day, he went to see the maintenance yard boss, Jim Spahl, who filled out an accident report on Mr. Bogden’s behalf. (CX 1, TR 78). Mr. Bogden told Spahl what happened, signed a blank accident report, and Spahl filled in the form. (TR 79-80). He told Spahl he would try to work the next day.

The next day, after taking pain pills which had been prescribed to him for esophagitis, Mr. Bogden went to work, however by 12:30 p.m., the pills started to wear off and he went to Greene

County Memorial Hospital. (TR 81-82, CX 7). He was discharged to return to work with limitations, which he took to work with him. Jim Spahl told him there was no work available at Consolidation within those limitations. (TR 83-84, 112).

Mr. Bogden was referred by Consolidation to Dr. Falor, who was then, but is no longer, on their panel of approved physicians.³ Dr. Falor treated him from March 22, 1996, to date. (TR 84). The claimant underwent physical therapy on his back and shoulder, although he stated he experienced more pain with the therapy. (TR 116). Dr. Falor initially told the claimant “to let nature takes its course” regarding his back. (TR 86). As early as June 1996, Dr. Falor referred him to Dr. Buterbaugh at Allegheny General Hospital, who performed surgery on his right shoulder in August 1996. (TR 86). He is still treated by Dr. Buterbaugh.

The claimant testified, regarding the emotional effects of the accident, that when he is home by himself, he would break down and cry because he cannot understand why his employer treated him the way it did since he was a good employee. (TR 96). Prior to March 20, 1996, he had no trouble with his low back or right leg, except for a pulled muscle in his back in 1982, for which he had six days of light duty, but never missed a day of work. (TR 96). The only other work injury he suffered was a smashed finger in 1991, for which he missed nine days of work. (TR 97). He had esophagitis in 1995, for which he still takes medication, but for which he only missed one day of work. (TR 97).

Presently, the claimant has a numbing sensation and no extension in his right shoulder. Holding his arm out straight and twisting to the left causes pain to shoot into his elbow. (TR 98). He cannot hold anything over his head. (TR 99). He has no problem extending his arm straight out. (TR 109). He has a constant 24-hour “earache” type ache in his right lower back, and if he bends down more than three times in succession, the whole right side of his back locks up and gets hard as a rock. He has no pain on the left side of his lower back. (TR 123).

Between his right shoulder blade and spine, he tore a muscle on the day of the accident that forms a ball if he over-exerts his back. (TR 99). He was undergoing therapy and a “TENS unit” prescribed by Dr. Monticollo until Consolidation refused to pay for it in January of 1997. (TR 100). Presently, he treats the knot in his back with a vibrating heat pad. He continues to suffer burning in his right leg, from just above the knee up the leg, if he stands for more than 45 minutes. (TR 102). On three occasions, he collapsed when turning in a quick twisting motion and his legs went out. (TR 102-103). He is presently taking Naprosyn and Tylenol 3 with codeine. (TR 91). Dr. Falor also prescribed Flexeril for muscle spasms in his back, which he uses only when he absolutely has to. (TR 91, 125).

The claimant received no notice that he was supposed to return to work until he received a compensation suspension letter from Cantlon Associates, Consolidation’s insuring authority, stating that he never showed up for work. (TR 128-29). The Notice of Final Payment or

³ According to the claimant’s testimony, Dr. Falor resigned from the panel due to Mr. Bogden’s case. He testified that a representative from Cantlon Associates told both a nurse in Dr. Whiting’s office and Mrs. Falor (Dr. Falor’s wife) that it would not honor Mr. Bogden’s medical bills because he did not have a back injury, despite Mrs. Falor informing them that he was being treated for a back injury. (TR 91-94).

Suspension of Compensation Payments was based on Dr. Ricci's affidavit of recovery after a January 26, 1998, medical examination. (CX 5, EX H).

Mr. Bogden has not applied for any jobs since the injury, and does not receive compensation from any other employment. (TR 126). He testified that he is not physically able to return to work. The most physical work he can do is get on his tractor and cut grass for eight minutes. (TR 129). He is unable to have physical relations with his wife, and can no longer dance. (TR 130).

Mrs. Elaine Bogden testified that her husband used to be an avid hunter and fisherman, which he is no longer able to do. He can no longer dance, go Christmas shopping, or ride in the car for long periods of time. He always did all the yard work and work in the house such as painting and drywall. She concluded that his life has changed one hundred percent since he can no longer do any of these things. (TR 132-33). She stated that he has difficulty sleeping, is under a lot of stress, and in a lot of pain. (TR 133).

B. MEDICAL EVIDENCE

1. Green County Memorial Hospital Records

Mr. Bogden was treated on March 21, 1996, the day after the accident, at Greene County Memorial Hospital. (CX 7). An x-ray of the Lumbrosacral spine revealed mild spurring of the lumbar spine and upper lumbar degenerative disk disease. An x-ray of the right shoulder was negative for fractures or dislocations but revealed degenerative spurring of the AC joint. He was released to return to work with limitations including no lifting more than five pounds, no prolonged standing or walking, and no repetitive bending and twisting.

2. Dr. Stanley E.L. Falor

The claimant began treating with Dr. Falor, who is board-certified by the National Board of Medical Examiners, as well as board-eligible in emergency medicine, on March 22, 1996, after a referral by Consolidation. (CX 8, 31). He diagnosed "848.9 pulled muscles in back, right pectorals and right quadriceps." Dr. Falor continued the claimant on Percocet and Flexeril, in addition to prescribing Doxepin. He advised Mr. Bogden to start physical therapy that day. He concluded Mr. Bogden was not fully recovered and was uncertain when he could return to work.

On April 7, 1996, the claimant underwent an MRI on his right shoulder at Dr. Falor's recommendation. (CX 10). The MRI, which was interpreted by Dr. William Almasy, showed mild impingement syndrome from AC joint, degenerative spurring with thinning of the rotator cuff and evidence of mild strain or tendinitis, but was negative for a rotator cuff tear. An MRI of the L-S spine on April 14, 1996, which was interpreted by Dr. Almasy, revealed multilevel degenerative narrowing of the discs with midline disc herniation of L5-S1 considered small, significance is uncertain. Facet degenerative changes were also noted. (CX 11).

Notes from June 20, 1996, state that Dr. Falor referred Mr. Bogden to Dr. Buterbaugh for surgery. On March 14, 1997, Dr. Falor noted that Dr. Monticollo ordered a TENS Unit, but Dr.

Hennessey, an independent medical examiner, told the claimant he did not need it. Dr. Falor agreed a TENS Unit should be used on the lower back and right rhomboid major muscles, however his request was denied based on Dr. Hennessey's report. (CX 8 p. 22, 82).

Dr. Falor completed a "Work Capacity Evaluation" for the Department of Labor on August 6, 1996. (CX 8 p. 89). He listed the following activity limitations for Mr. Bogden: (1) occasional twisting when standing up; (2) bending to 60 degrees rarely; (3) reaching and lifting totally; (4) kneeling and standing over 15 minutes totally. Based on these limitations, he stated that the claimant could occasionally lift and carry ten pounds up to three times in fifteen minutes, but then must rest 30 to 45 minutes, two hours out of 24 hours. He concluded that the claimant could work one to two hours per day, for 15 minutes per hour. He stated that all right shoulder limitations were due to the March 20, 1996 injury and that there were no limitations before the injury, although x-rays showed arthritis of the right A-C joint. He anticipated the limitations would continue until the claimant recovered from his August 1996 shoulder surgery, in addition to any surgery or rehabilitation required for the herniated disk. He stated that he "could only guess" that the claimant would reach maximum medical improvement in January 1997.

Another "Work Capacity Evaluation" was completed by Dr. Falor on October 15, 1996. (CX 8 p. 92). He stated that the claimant was unable to walk or lift at that time. He noted that the claimant just had shoulder surgery, which needed to heal and be rehabilitated, and may need lumbar surgery. He opined that the claimant would be unable to work until released by his neurosurgeon and orthopedist, stating, "it would be a wild guess to say 3 more months."

A third "Work Capacity Evaluation" was completed on February 7, 1997. (CX 8 p. 95). Dr. Falor listed a standing limitation of five minutes before pain. He also noted that sudden left back rotation caused loss of sensation and strength in his legs and the patient falls down. Dr. Falor found Mr. Bogden fully restricted at this time from all the limitations. He did not know when maximum medical improvement would be reached.

Dr. Falor completed a report on July 31, 1998. (CX 28). He summarized all of the diagnoses made regarding the claimant from numerous physicians since the accident. He also noted that the conditions of bone spurs and right shoulder AC joint arthritis pre-existed the accident, but were aggravated by the accident. Dr. Falor noted that Mr. Bogden was treated by him from March 22, 1996, until his last appointment of July 2, 1998, and will remain under his care at least until his next appointment on August 27, 1998. In Dr. Falor's professional opinion, "within a reasonable degree of medical certainty Phillip Bogden is permanently disabled from returning to work due to his injuries of 3/20/96."

3. Health Trax Rehabilitation Systems Physical Therapy Centers

Mr. Bogden began physical therapy at Health Trax on March 25, 1996, under the care of John P. Karney, MSPT, ATC. (CX 9). His assessment after the first examination was that Mr. Bogden exhibited deficits in pain-free range of motion and strength of the right shoulder and LB regions, and identified muscle groups. The goals for Mr. Bogden were to increase pain-free range of motion of identified deficit areas to "WNL", increase strength of identified muscle groups to "WNL", and decrease subjective pain complaints to a rating of 0/10 at best. Mr. Bogden had 44

therapy sessions at Health Trax through July 15, 1996, when Dr. Falor withdrew him from therapy to consult an orthoped. (CX 9 p.11).

Mr. Bogden returned to Health Trax for post-operative therapy after his August 23, 1996, shoulder surgery. (CX 17). He continued therapy through June 18, 1997, when he was discharged because he had reached “maximum rehab potential at this time” and was given an independent home program. (CX 17 p. 33). “Medical Report Forms” completed by the claimant’s physical therapist, Eugene Zappa, as late as June 16, 1997, stated that he could not return to his pre-injury job without restrictions. (CX 17 p. 49).

4. Dr. Stanford J. Huber

Dr. Huber, of the Northern West Virginia Pain Management Center, saw the claimant on April 30, 1996, at Dr. Falor’s referral. (CX 12). Dr. Huber stated that Mr. Bogden had a herniated disc, which he believed was causing root irritation. Although he gave the claimant an epidural steroid injection at that time, Mr. Bogden did not benefit from it at all. On May 20, 1996, Dr. Huber noted that the MRI showed degenerative disc disease with a midline disc herniation at L5-S1, and he did not think it wise to proceed with any further epidural steroid injections.

5. Dr. Paul S. Lieber

Dr. Lieber performed an independent medical examination on the claimant on July 10, 1996. (CX 23). He noted a history of lumbosacral sprain. The MRI evidence showed evidence of mild L5-S1 left paracentral disk protrusion and rotator cuff impingement of the right shoulder with tendonitis, but ruled out a rotator cuff tear. He noted a possible right L3 radiculopathy versus meralgia paresthetica (entrapment of lateral femoral cutaneous nerve). He believed the L5-S1 disc was an asymptomatic finding and not contributing to the patient’s symptoms at that time. Dr. Lieber noted objective evidence of atrophy in the right thigh along with weakness in the iliopsoas and quadriceps. Based on his findings, he concluded that Mr. Bogden was capable of performing only sedentary duty work at that time.

6. Dr. Glenn A. Buterbaugh

Mr. Bogden was referred to Dr. Buterbaugh, at the Pennsylvania Center for Surgery of the Hand and Upper Extremity, by Dr. Falor for treatment of his right shoulder on July 22, 1996. (CX 13). Based on Mr. Bogden’s continued symptoms of right shoulder pain and failure of a trial conservative treatment, he recommended the claimant undergo right shoulder acromioplasty with a distal clavicle resection and possible rotator cuff repair. Dr. Buterbaugh performed the right shoulder acromioplasty with repair of complete rotator cuff tear, distal clavicle resection, and bursectomy, on August 23, 1996. (CX 13-14). He continues to treat Mr. Bogden to date.

On October 15, 1997, Dr. Buterbaugh released the claimant to work light duty, within the physical capacity evaluation (“PCE”) Guidelines. (CX 13 p.15). A “Functional Capacity Evaluation Summary,” completed by Bob Irwin, OTR/L, CHT, revealed the overall functional capacity was equivocal, listing the following guidelines: (1) capable of using his left and right

hands in moderate hand strength tasks; (2) currently performing “light” physical demand characteristic of work level which permits 20 pounds occasional lift/carry, 10 pounds frequent, negligible constant; (3) may use right hand with fair accuracy and average speed; (4) may use left hand with good accuracy and average speed; (5) limited use of hands in moderate-heavy tasks, such as sledge hammer and pry bars; (6) positioning of body for use of tools may be problem due to diminished range of motion in low back and right shoulder; (7) should avoid prolonged static postures with the back and bending at the waist should be eliminated; (8) some limitation noted in range of motion and strength of grasp diminished in both hands.

Office notes from the claimant’s June 29, 1998, examination note increasing pain about his right shoulder over the last six months and some crepitation on range of motion. (CX 29). X-rays showed mild degenerative changes. An MRI of the right shoulder was performed on July 7, 1998. (CX 30, 32). The tendon of the rotator cuff was intact. There was increased signal within the superior glenoid labral cartilage and the remaining labral cartilage was intact. The tendon of the long head of the biceps was normal. There was a small collection of fluid in the subcoracoid bursa. Overall, the MRI showed degenerative changes in the superior glenoid labral cartilage.

7. Dr. Donald M. Whiting (and Edward Powell, PA-C)

The claimant was referred to Dr. Whiting by Dr. Buterbaugh. He examined the claimant on September 12, 1996, and found Mr. Bogden’s symptoms most likely due to musculoskeletal strain as well as possible L3 or L4 radiculopathy. (CX 15). At his recommendation, a bone scan was performed on October 4, 1996, revealing narrowing of a disc space suggested at L4-L5 and localized increased activity in the region of the L5-S1 level on the right side. (CX 16). A bone imaging spect was abnormal, showing intense localized increased activity in the region of the articulating facets at the L5-S1 level on the right side, which suggested biologically active facet disease at that level. The rest of the spect scan was normal.

Mr. Bogden was seen by Edward Powell, PA-C, of Dr. Whiting’s office, on October 9, 1996, for a follow-up evaluation. (CX 20). In a letter to Dr. Buterbaugh, Mr. Powell stated that the intense increased uptake in the articular facet on the right side at the L5-S1 level was most likely causing the claimant’s symptoms. He stated that they were sending Mr. Bogden for a right L5-S1 facet block, and would see him at the Spine Institute once it was done. If the symptoms continued, he suggested that Mr. Bogden be considered for a facet rhizotomy.

8. Dr. Michael J. Platto

Dr. Platto performed an “electrodiagnostic evaluation” to evaluate the claimant for lumbar radiculopathy, at the referral of Dr. Whiting, on October 4, 1996. (CX 18, EX G). He concluded that the EMG/Nerve conduction study was normal and there was no evidence of lumbar radiculopathy, peripheral neuropathy or other focal nerve entrapment.

9. Dr. Gerard M. Monticollo (Pain Management Center, Washington Hospital)

Dr. Monticollo first evaluated the claimant on November 15, 1996, at the referral of Dr.

Whiting. On December 3, 1996, the claimant underwent a procedure attempting to enter the L5-S1 facet, which was unsuccessful due to significant hypertrophic bony overgrowth. Instead, he performed a median facet branch nerve block, which reportedly gave the claimant 5-6 hours of relief in his low lumbar region. (CX 19). Another attempt to enter the L5-S1 facet on January 17, 1997, was unsuccessful. On January 21, 1997, Dr. Monticollo performed a “Right L-5, S-1 facet block under fluoroscopy” and was able to enter the facet joint and totally relieve the right lateral thigh pain. At the February 5, 1997, examination, the claimant was still experiencing persistent right low lumbar pain.

On March 10 and May 1, 1997, Dr. Monticollo stated the claimant’s lower back pain was mechanical in origin and was best treated with anti-inflammatory medication and the use of physical therapy with a TENS Unit. (CX 19).

10. Dr. Melvin C. Alberts (Spine Institute of Southwestern Pennsylvania)

The claimant was first treated at the Spine Institute on December 11, 1996. (CX 20). His examination revealed some “exquisite tenderness” in the L5-S1 area on the right side, marked pain with right side bending, and low back pain in the same area with straight leg raises. Dr. Albert found no motor weakness or reflex loss. He noted decreased pinprick in the distribution of the lateral femoral cutaneous and most likely meralgia paresthetica.⁴ He recommended that Mr. Bogden lose weight, get into a regular aerobic exercise program, and become more aggressive with physical therapy. He suggested follow-up with Dr. Monticollo. Dr. Alberts could not understand why there was no significant or transient improvement after Dr. Monticollo’s facet block, as he suspected Mr. Bogden was suffering a facet arthropathy for at least part of his problem.

Dr. Alberts again examined Mr. Bogden on January 15, 1997. In a letter to Dr. Monticollo, he stated that, in addition to the L5-S1 facet arthropathy, the claimant appeared to have meralgia paresthetica. He advised Mr. Bogden to lose weight and perform abdominal strengthening exercises due to alleviate the burning dysesthesia.

11. Dr. Bill Hennessey

The claimant underwent an independent medical examination by Dr. Hennessey, who is a Fellow of the American Academy of Physical Medicine and Rehabilitation and the Association of Academic Physiatrists, and a Diplomate of the National Board of Medical Examiners, on February 28, 1997. (EX A, B). He concluded the claimant’s low back pain was most likely related to a L5-S1 facet joint arthropathy, based on the pain along the lateral aspect of the thigh with aggravation with the back in extension and lateral bending. The right shoulder pain was related to his March 20, 1996, injury. He noted that Mr. Bogden had made significant progress in his shoulder since the time of the injury, although he still had minor weakness and moderate discomfort with activity at or above shoulder level. Dr. Hennessey opined that the anterolateral thigh numbness was most likely a meralgia paresthetica, which is not a work-related diagnosis.

⁴ “Meralgia paresthetica” is pain and numbness in the outer surface of the thigh due to entrapment of the lateral femoral cutaneous nerve at the inguinal ligament. Dorland’s Pocket Medical Dictionary, 23rd Ed., W.B. Saunders Co. (1982).

Finally, he noted the claimant's history of a lumbosacral strain, stating that a strain injury of March 20, 1996, would have healed within six weeks from the date of injury, therefore, it was not responsible for his current condition.

In response to questions from Cantlon Associates, he concluded that the claimant's symptoms agreed with the physical examination findings and diagnostic testing. He did not detect any malingering tendencies. He did not believe that the arthropathy was work-related to the event of March 20, 1996. The residuals of the work-related injury was the right shoulder condition, which was healing following surgery and therapy. The combination of the low back discomfort and rotator cuff tear would render it inappropriate for Mr. Bogden to return to his job duties as a dock man at that time.

Dr. Hennessey agreed with Dr. Monticollo regarding further facet joint injections and possible radio frequency ablation of the medial bundle branch blocks of the facet joint, to alleviate some of the claimant's low back discomfort, which was non-work related. However, he opined that Mr. Bogden did not have a medical diagnosis which would justify the diagnosis of a TENS Unit, explaining that the TENS Unit would not relieve discomfort of a facet arthropathy, and is not proven effective for any diagnosis involving the spine.

12. Dr. Thomas J. Romano

The claimant was examined by Dr. Romano, who is a Diplomate of the American Board of Internal Medicine and the American Academy of Pain Management, with practice limited to rheumatology, on June 30, 1997, at the request of his attorney. (CX 21). Based on his examination, he found that Mr. Bogden suffered from several permanent problems secondary to the March 20, 1996, accident. He noted a clear mechanical injury of the right shoulder, which was treated surgically, but for which Mr. Bogden had continued problems. In his opinion, the claimant had adhesive capsulitis⁵ of the right shoulder as well as a post traumatic myofascial pain syndrome affecting the upper back and shoulder region, right mid back, and right hip area.

Furthermore, he found it clear from the MRI that the claimant suffered a midline disc herniation of L5-S1, as well as facet degenerative changes, especially at L5-S1 and other levels. He opined that the accident did not cause the degenerative changes, but rather aggravated or accelerated the degeneration while causing the actual frank disc herniation. He further opined that the low back pain was most likely related to a right L5-S1 facet joint arthropathy as well as the herniated disc. The right shoulder pain, which had not resolved and continued to be quite active, was secondary to the March 1996 accident.

13. Dr. Patrick G. Laing

The claimant underwent an independent medical examination by Dr. Laing, who is certified by the American Board of Orthopaedic Surgery, an active staff member at several

⁵ "Adhesive capsulitis" is defined as the adhesive inflammation between the joint capsule and the peripheral articular cartilage of the shoulder with obliteration of the subdeltoid bursa, characterized by painful shoulder of gradual onset, with increasing pain, stiffness, and limitation of motion. Dorland's Illustrated Medical Dictionary, 28th Ed., W.B. Saunders Co. (1994).

Pittsburgh hospitals, and a professor of orthopaedic surgery, on July 11, 1997. (EX C, D). He summarized the claimant's accident and subsequent treatment to date, as well as the claimant's present complaints. The examination revealed the claimant walked normally and undressed, standing and bending freely to remove his socks, with no evidence of pain. He noted that, on grip strength testing, the claimant did not exert maximum effort with his right hand. There was a full and bilateral equal range of motion in shoulders, elbows and wrists. Dr. Laing noted there was no "erecto spinae" muscle spasm in any area of the spine, and there was full and bilaterally equal range of motion in hips, knees, and ankles. However, the claimant complained of pain with all motions of the dorsal and lumbar spine, the right hip, and any active or passive straight leg raises on the right.

Based on his examination, history, and review of the MRI and x-rays, Dr. Laing concluded there was no objective evidence of any residuals of the March 20, 1996 injury and no objective evidence of any orthopaedic abnormality which could be attributed to the injury. He found no objective evidence of impairment or disability relative to the work injury or any other etiology. Also, he found no evidence of any non-work related condition which would cause the symptoms claimed by Mr. Bogden. He concluded that the subjective symptoms did not agree with the objective findings on examination. In Dr. Laing's opinion, the claimant fully recovered from his injury of March 20, 1996, and was capable of performing the full duties of his usual work as a dockman with no further necessary treatment.

14. Dr. Emira D. Zubchevich

Dr. Zubchevich, a psychiatrist, evaluated Mr. Bogden on July 16, 1997, at the request of his attorney. (CX 22). She noted that his mood was depressed, dysphoric, anhedonic and anergic. He lacked motivation, initiative and interest. She noted that his sleep was disturbed and, since the accident, he is impotent. The claimant was tense, irritable, and anxious, he repressed a great deal of anger, worried, and was often hopeless. His anxiety was accompanied with tachycardia (rapid heart beat) and headaches. He also suffered from frequent crying spells and suicidal thoughts.

Dr. Zubchevich listed "Axis I" diagnoses of post traumatic stress disorder and major depression, single episode. There were no "Axis II" diagnoses. She listed "Axis III" diagnoses of intervertebral disc disease in cervical/lumbar spine, right L5-S1 status post right shoulder acromioplasty with repair of complete rotator cuff tear, distal clavicle resection, and bursectomy. "Axis IV" listed the industrial accident of March 20, 1996. Under "Axis V", Dr. Zubchevich listed that his adaptive behavior was poor. The patient was not capable of adapting in social or occupational environments. She found his prognosis "poor," stating that his physical and emotional condition were not likely to improve. She explained that the chronic pain intensified his emotional reaction, and his emotional reaction intensified the pain.

Prior to the industrial accident, Mr. Bogden was a healthy male, capable of strenuous work, enjoying his life to the full extent as a family man and pursuing social hobbies such as dancing, hunting and fishing. Dr. Zubchevich noted that, since the accident, due to fear and pain, he developed numerous emotional symptoms characteristic of post traumatic stress disorder and

major depression. In addition, she noted he has chronic low back pain, right shoulder restriction and impotency that might be secondary to the injury or, less likely, to emotional distress. She found that his illness diminished his capacity in social activity, and together with pain, caused him to withdraw and relinquish most of his interests, losing motivation and initiative for any work. Dr. Zubchevich concluded the claimant's emotional condition was secondary to the accident and the chronic pain was incapacitating.

15. Dr. Tony Ricci

Dr. Ricci, who is board-certified by the American Board of Physical Medicine and Rehabilitation, Part I, performed an independent medical examination of the claimant on January 26, 1998. (EX E, F). Dr. Ricci summarized the claimant's accident, history of treatment, and current complaints of decreased range of motion in the right shoulder, right shoulder weakness, constant low back ache, occasional "locking" of the low back, and both legs giving out after repeated bending of the low back. Based on his examination, Dr. Ricci opined that Mr. Bogden has achieved a full medical recovery from his work related injuries of March 20, 1996, and was able to resume full-time, full-duty employment as a dockman. Physical examination revealed no objective findings to support the patient's continued reports of low back discomfort and right shoulder discomfort associated with limited range of motion. In fact, the patient exhibited a jerking response at the right ankle dorsiflexors and a nondermatomal sensory loss over the entire right leg, findings indicating a non-organic basis for his reported symptoms. Finally, he noted Mr. Bogden demonstrated full active range of motion of the right shoulder and there was no discomfort to palpation or range of motion of the right shoulder.

Dr. Ricci completed an "Affidavit of Recovery" on January 26, 1998, stating that Mr. Bogden had fully recovered from the lumbar strain and right rotator cuff tendonitis suffered in the March 20, 1996, accident.

Dr. Ricci was deposed June 12, 1998. (EX I). He testified that he was certified in mine safety and health administration, in preparation for an underground tour at Dilworth mine. (Deposition at 5-9, EX F-1). In addition to explaining the substance of his report and examination, Dr. Ricci testified that Mr. Bogden sustained work-related injuries of lumbar strain and right rotator cuff tendonitis. He opined that the claimant achieved full medical recovery from these injuries and was able to resume full time, full duty employment as a dockman. (Deposition at 29-30). He reiterated that he found no objective indications to support the claimant's continued reports of low back discomfort and right shoulder discomfort with limited range of motion.

Dr. Ricci found Mr. Bogden was not suffering a radiculopathy.⁶ Furthermore, he disagreed with Dr. Romano, stating the patient did not have adhesive capsulitis because there was

⁶ A radiculopathy is a disease of the nerve roots. Dorland's Illustrated Medical Dictionary, 28th Edition, W.B. Saunders (1994).

normal external rotation.⁷ Dr. Ricci ruled out a diagnosis of myofascial pain syndrome based on a lack of trigger points in Mr. Bogden's back and shoulder, although on cross-examination he acknowledged that, in some instances, the condition can be characterized by remissions and exacerbations. (Deposition at 55-56). He testified the L5-S1 facet joint arthropathy (arthritis) was a pre-existing underlying condition which, based on the mechanism of injury, would not be exacerbated or aggravated by the work injury. (Deposition at 36-37). He stated that Mr. Bogden suffered from asymptomatic disc herniation, common to 25 to 30 percent of all individuals, which could not be causing his pain because there was no impingement of nerves. (Deposition at 38-39). He did not find any evidence that the claimant had neuralgia parasthetica. (Deposition at 43).

16. Dr. William J. Mitchell

The claimant underwent a medical examination by Dr. Mitchell, a board-certified orthopedic surgeon, on March 24, 1998.⁸ (CX 24). Dr. Mitchell also reviewed the claimant's medical records since the accident. After a physical and x-ray examination, as well as a review and summarization of all the medical evidence, Dr. Mitchell diagnosed post operative status, repair right rotator cuff on dominant extremity, and post operative status, resection acromioclavicular joint, right shoulder. As a result of these diagnoses, Dr. Mitchell found Mr. Bogden unable to use his right shoulder at or above shoulder level with any degree of strength, repetitive use or freedom from pain. While he did have use below shoulder level, he still experienced pain in the shoulder when using his right hand to strongly grip or pull.

Dr. Mitchell found that the claimant exhibited: (1) post traumatic biologically activated facet disease at L5-S1 on the right, unrelieved, long term, facet blocks only give temporary relief; (2) post traumatic meralgia parasthetica of the right thigh, with associated deep burning pain and superficial skin numbness, aggravated by changes in position, sitting, standing, and walking; and (3) pre-existent degenerative changes in the lumbar spine and AC joint. He opined that Mr. Bogden was permanently disabled as a result of these conditions arising from his accident, because he is a right-handed individual and does not have the free and unrestricted movement in his right upper extremity. His function is limited strength-wise and pain-wise above shoulder level, and there are structural limitations as a result of his surgery. In addition, Dr. Mitchell noted that Mr. Bogden had chronic, persistent low back pain arising from several sources, including the post traumatically activated L5-S1 facet disease, the post traumatic meralgia parasthetica, and the disc at L5-S1. With this combination of problems, Dr. Mitchell opined that it was not possible for Mr. Bogden to return to work.

17. Social Security Decision

On December 24, 1997, the Social Security Administration found Mr. Bogden disabled,

⁷ Dr. Ricci defined adhesive capsulitis as "the contraction and constriction of a soft tissue structure of the right shoulder, similar to "Saran Wrap," which envelopes the glenohumeral joint and usually tightens anteriorly more than posteriorly. (Deposition at 34).

⁸ Although Dr. Mitchell's curriculum vitae is not in the record, Dr. Ricci testified that Dr. Mitchell was a board-certified orthopedic surgeon. A review of the American Medical Association, Directory of Physicians in the United States, 35th Edition, supported that Dr. Mitchell is, in fact, board-certified in orthopedic surgery.

within the meaning of the Social Security Act, since March 21, 1996. (CX 25). Administrative Law Judge David B. Daugherty found the claimant retained the residual functional capacity to engage in sedentary level of work activity subject to numerous non-exertional impairments, but was unable to perform his past relevant work.

IV. CONCLUSIONS OF LAW

The claimant alleges that he is totally and permanently disabled, and has been since March 20, 1996, because of his work-related injuries. He argues that his benefits, which were terminated by the employer as of February 5, 1998, should be reinstated effectively from February 5, 1998, through the duration of his disability. Finally, the claimant argues the employer should pay his medical expenses pursuant to Section 7 of the Act, less amounts already paid, and provide such additional services as the claimant's condition may require.

The employer concedes that Mr. Bogden suffered a work injury on March 20, 1996, and that the claimant has degenerative changes to his right shoulder and lumbar spine. (Employer's Brief at 13). However, the employer alleges the changes were not caused, aggravated, or exacerbated by the work injury, and Mr. Bogden does not now suffer any residuals whatsoever from the work injury.

It is well-established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.*; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

A. INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2). The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). The claimant must establish each element of his prima facie case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

Once the prima facie case is established, a presumption is created under Section 20 (a) of the LHWCA that the employee's injury arose out of employment. 33 U.S.C. § 920(a). Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989).

The employer must rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *Quinones, supra*; *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). In *Fargo v. Campbell Industries*, 9 BRBS 766 (1978), the Board affirmed an award of permanent total disability benefits, stating the aggravation of a pre-existing arthritic condition by a work-related injury was completely compensable under the LHWCA.

If the Administrative Law Judge finds the presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 270 (1990).

In this case, the parties have stipulated that a work-related injury occurred on March 20, 1996, within the course and scope of the claimant's employment with Consolidation Coal Company. Thus, the issue to be addressed is the nature and extent of the claimant's disability, if any.

B. DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991). The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

1. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988). Any disability before reaching MMI would be temporary in nature.

The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician. *See Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the

determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom., Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom., Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Dr. Falor, a board-certified medical examiner, has treated the claimant regularly since the day after the accident of March 20, 1996. Additionally, he has been actively informed of the claimant's condition and treatments by the physical therapists and other physicians, including Dr. Buterbaugh, to whom the claimant was referred for treatment. Dr. Falor completed several "Work Capacity Evaluations" during the course of his treatment of the claimant, the most recent of which was February 7, 1997. (CX 8, p. 95). At that time, he stated that Mr. Bogden was fully restricted due to numerous limitations, and Dr. Falor did not know when maximum medical improvement would be reached. At that time, Mr. Bogden was "fully restricted" from a five minute limitation on standing before pain, and from any sudden back rotation. He also noted that tendonitis in the right shoulder limited all lifting with the right hand. As of June 16, 1997, the physical therapist from Health Trax stated that Mr. Bogden could not return to his pre-injury job without restrictions. (CX 17, p. 49).

On July 31, 1998, Dr. Falor opined that Mr. Bogden was permanently disabled from returning to work due to his injuries of March 20, 1996. (CX 28). If a physician does not specify the date of maximum medical improvement, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. *See Jones v. Greco, Inc.*, 21 BRBS 12, 15 (1988).

The employer's termination of benefits was based on Dr. Ricci's "affidavit of recovery" which was based on his examination of the claimant on January 26, 1998. (EX E, F). Likewise, Dr. Laing examined the claimant on July 11, 1997, finding him fully recovered from his injuries and capable of performing the full duties of his job. (EX C, D).

I give greater weight to the opinions of Drs. Falor and Buterbaugh, as they have been regularly and actively involved in every step of the claimant's treatment and therapy since the

accident or soon thereafter, as opposed to the cursory examinations of the independent medical examiners.⁹ Furthermore, the claimant's thorough and credible testimony supports a finding that he still suffers the residual effects of the March 20, 1996, accident. As such, I find that the claimant has established that his injuries became permanent as of July 31, 1998.

2. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a *prima facie* case of total disability by showing he cannot return to his regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

The Judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In doing so, an Administrative Law Judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witness, including doctors, and draw his own inferences from the evidence. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998). The Board held, in *Lombardi*, that the credited medical opinion of a claimant's treating orthopedic surgeon, in connection with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id.*

Mr. Bogden spent 90 percent of his time working on the barges, setting up loads and empty strings for preparation to load the barges with coal. (TR 30-31). Presently, Mr. Bogden alleges he is physically unable to return to his usual employment because he has no extension in his right shoulder, he cannot hold anything above his head, he has constant pain in his right lower back, and if he bends down more than three times in succession, the right side of his back "locks up." On several occasions, he collapsed when turning in a quick twisting motion and his legs went out, and he continues to suffer burning from just above his right knee up the leg, when he stands for more than 45 minutes.

A claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Construction*, 13 BRBS 882, 884 (1981). However, a judge may find an employee able to do his usual work despite complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro Area Transit Authority*, 13 BRBS 891 (1981).

In this case, I found Mr. Bogden's testimony regarding the strenuous physical

⁹ The claimant testified that his examination with Dr. Ricci lasted five minutes. (TR 128). Dr. Ricci did not mention to the claimant at any point during or after the examination that he found the claimant competent to return to work. (TR 129).

requirements of his employment, as well as the limitations and pain in his right shoulder and back, to be both thorough and credible.

As of October 15, 1997, Dr. Buterbaugh released the claimant to work light duty with restrictions including: elimination of prolonged static postured with the back and bending at the waist; using his left and right hands in moderate hand strength tasks; occasional carrying of 20 pounds, frequent carrying of 10 pounds, constant carrying of negligible weight; limited use of hands in moderate-heavy tasks; and positioning body for use of tools may be problem due to diminished range of motion in low back and right shoulder. Further supporting the claimant's testimony, Dr. Buterbaugh noted, as recently as June 29, 1998, that Mr. Bogden was still experiencing increasing pain in his right shoulder and that there was crepitation on range of motion. (CX 32). Also, as noted above, Dr. Falor, the claimant's treating physician, found him totally and permanently disabled from performing his job, as of July 31, 1998.

On the basis of the record provided, I conclude that the claimant has established that he cannot return to work as a dock man due to injuries suffered on March 20, 1996.

Once the claimant meets his *prima facie* showing, the burden shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Trans-State Dredging v. Benefits Review Board (Tanner)*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

The employer has set forth no evidence regarding suitable alternative employment, nor has it proffered an indication as to why, in preparation for the hearing, it did not develop such vocational evidence in support of an alternate defense in the event the claimant should be found unable to return to his usual work. As such, I find that the claimant is totally disabled from performing his usual employment duties as a dockman.

C. MEDICAL EXPENSES

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs, Inc.*, 8 BRBS 130, 140 (1978).

A claimant has established a *prima facie* case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a

claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonable and necessity of treatment. *Salusky b. Army Air Force Exchange Service*, 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984).

An employer's physician's determination that the claimant is fully recovered is tantamount to a refusal to provide treatment. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C. Cir. 1984); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. *Roger's Terminal and Shipping Corporation v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Mr. Bogden testified that the lower right side of his back gets hard as a rock and stiffens up if he overexerts his back. (TR 99-100). In this case, both Dr. Falor, the claimant's treating physician, and Dr. Monticollo, a pain management specialist, opined that the claimant's lower back pain should be treated by physical therapy with the use of a TENS Unit. (CX 8, p.22, 82, CX 19). The claimant received the TENS Unit for one week, but was informed that Consolidation would not approve it, based on a report by Dr. Hennessey. Dr. Hennessey opined that, although placement of the TENS Unit on the claimant's lower back did provide some relief, the TENS Unit would not relieve the discomfort of a facet arthropathy, nor is it proven effective for any diagnoses involving the spine. (EX A).

The record also contains an unpaid medical bill, for services rendered the claimant by Dr. Monticollo on December 3, 1996. (CX 26). A review of the records reflects that at the December 3, 1996, treatment by Dr. Monticollo, a median facet branch nerve block was performed, which gave the claimant 5-6 hours of relief in his low lumbar region. (CX 19). Dr. Hennessey acknowledged that the facet nerve block provided partial relief of the claimant's symptoms, however he opined that the low back discomfort was not work-related. (EX A).

In light of my findings above that the claimant is totally and permanently disabled due to injuries in his lower back and right shoulder suffered in the March 20, 1996, accident, I find this treatment for his back pain compensable under the Act. The TENS Unit therapy was giving relief to the claimant's pain when applied to his lower back, as did the facet branch nerve block on December 3, 1996. Furthermore, Dr. Falor, whose opinion I have credited above all other physicians in this case, recommended the use of the TENS Unit, as did Dr. Monticollo, a pain specialist. As such, I find the use of the TENS Unit necessary and reasonable for the treatment of the claimant's work-related injury.

V. CONCLUSIONS

Based on the credible testimony of the claimant, and fully supported by the medical opinions of his long-time treating physicians, Drs. Falor and Buterbaugh, I find that Mr. Bogden is totally and permanently disabled from performing his employment as a dockman. The date of

maximum medical improvement is July 31, 1998, at which time his disability became permanent. Furthermore, the employer is liable for all reasonable and necessary medical expenses incurred in the treatment of the claimant's total and permanent disability, including Dr. Monticollo's treatment with a facet branch nerve block and the use of a TENS Unit on his lower back.

ORDER

IT IS HEREBY ORDERED that:

(1) Employer shall pay to Mr. Bogden temporary total disability benefits from February 5, 1998, through July 31, 1998, based on an average weekly wage of \$1,172.56;

(2) Employer shall pay to Mr. Bogden permanent total disability benefits from August 1, 1998, based on an average weekly wage of \$1,172.56;

(3) Pursuant to § 7 of the Act, Employer shall pay for all of Mr. Bogden's reasonable and necessary medical expenses arising out of the claimant's March 20, 1996, injury, including expenses related to a TENS Unit therapy and facet branch nerve block;

(4) Employer shall pay to Mr. Bogden interest on all past due benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director;

(5) Counsel for the claimant, within 30 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to all opposing counsel who shall then have 10 days to respond with objections thereto. 20 C.F.R. § 702.132;

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

RICHARD A. MORGAN
Administrative Law Judge

Dated: 9/16/98
Pittsburgh, PA

RAM:KM:DMR

